Supreme Court, U.S.
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No. 01-241

In the
SUPREME COURT OF THE UNITED STATES

RICHARD FALLON, M.D.,
Petitioner,

v.

STATE BOARD OF REGISTRATION
FOR THE HEALING ARTS,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state medical licensing board charged with determining the competency of physicians is barred by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), from investigating the exercise of medical judgment by a physician when he is employed as the medical director of a managed care organization and exercises medical judgment in the course of assisting that organization in making a benefits determination for an ERISA plan.

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STATEMENT OF THE CASE

This case arose from an attempt by Missouri's State Board of Registration for the Healing Arts ("Board") to do its job: to protect the public health and welfare by determining the competency and qualifications of physicians. The Board was established for "the purpose of registering, licensing and supervising all physicians and surgeons" in Missouri. *See* Mo. Rev. Stat. § 334.120.1 (2000). Among the physicians licensed by the Board is petitioner Richard Fallon, M.D. Until recently, Dr. Fallon was employed as a medical director for Prudential Health Care, which administers employee benefit plans. Such plans often cover only procedures that are medically necessary.

Among the assignments given to medical directors such as Dr. Fallon is the task of determining whether a particular treatment for which a plan participant seeks coverage is medically necessary.

On January 27, 1999, the Board received a written complaint against Dr. Fallon from Dr. Duane Keller, an oral surgeon. Dr. Keller had prescribed a surgical procedure for his patient, V.G.[1]; he complained about Dr. Fallon's determination that the procedure was not medically necessary. The Board reviewed the complaint and began an investigation. On November 23, 1999, the Board issued a subpoena to Dr. Fallon, directing him to meet with the Board's medical staff on December 8, 1999, and to bring documents related to the decision regarding V.G. The Board sought to gather more information regarding the pending complaint – and to allow Dr. Fallon the opportunity to respond to its allegations.

When Dr. Fallon failed to appear on December 8, the Board sought to enforce the subpoena by petitioning the Circuit Court of Cole County, Missouri.[2] On June 22, 2000, the Circuit Court issued a final judgment enforcing the subpoena. The Missouri Supreme Court affirmed that judgment on April 10, 2001.

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[1] Respondent follows the practice of all the courts that have heard this matter, using only the patient's initials to preserve her privacy.

[2] The Board's subpoenas are not self-enforcing. Thus Mo. Rev. Stat. § 334.127.2 (2000) requires that "[t]he Board enforce its subpoenas ... by applying to a circuit court ... for an order upon any person who shall fail to obey a subpoena to show cause why such subpoena should not be enforced."

REASONS TO DENY THE WRIT

This case has a very limited scope. As part of its assignment to protect the public health, the Board determines whether physicians are maintaining the standards necessary for licensure. That task requires that the Board investigate alleged lapses in medical judgment – lapses that show that a physician, if permitted to retain his license, may threaten the health of those who rely on his expertise. In seeking information from Dr. Fallon, the Board was only doing its job – the same job that is performed by licensing boards in all 50 states, covering a wide range of professions. This case involves nothing more than the Board's ability to investigate the competency of a physician.

Dr. Fallon argues that this case is extraordinary. In his view, the fact that the lapse in medical judgment may have occurred in the course of advising a managed care organization as to whether a particular procedure is medically necessary brings it out of the area of traditional state regulation and into conflict with decisions of this and other courts. And in his view, permitting this Board to investigate this exercise of medical judgment signals the beginning of the end for managed care plans providing benefits under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). It does neither.

1. Invoking their police power, states endeavor to protect the public health and welfare by licensing many professions, among them physicians. Missouri, like other states, has recognized that errors a physician makes while treating patients are not the only manner in which he may demonstrate that permitting him to retain a license to practice medicine may threaten the public health. Thus if a physician commits a crime or becomes incompetent to practice medicine because of substance abuse, the state can take disciplinary

action against his license — even if neither the crime was committed nor the abuse occurred in connection with the treatment of a patient. *See* Mo. Rev. Stat. § 334.100.2(1) and (22) (2000). By broadly defining the scope of activities that can form the basis for disciplining a license, the state acts prophylactically. It removes licenses – and thus both the legal right to treat patients and the government's implicit endorsement of competency to do so – from physicians who cannot be trusted to act with adequate care and skill, regardless of whether the loss of trust results from errors in a physician's treatment of his own patients.

Here, the Board received a complaint alleging that Dr. Fallon had erred so grievously when evaluating the necessity of a particular treatment that his competency to practice medicine was called into question. Petition at 3. The Board initiated an investigation of Dr. Fallon's medical judgment. It served on Dr. Fallon a subpoena that included a requirement that he bring records relevant to the point at which he applied his medical judgment, *i.e.*, the point at which he determined that the prescribed treatment was not "medically necessary," as required for coverage under V.G.'s plan. As a shorthand way of specifying the type of documents that could be relevant to its investigation, in its subpoena the Board identified potentially relevant documents by reference to the "denial of surgical insurance coverage." Pet. App. at 23a.

While investigating Dr. Fallon's use of medical judgment, the Board was in a position no different from other boards, commission, officers, or courts that regulate licensed professionals who may be employed by ERISA plans. A nurse, pharmacist, accountant, or even a lawyer, employed by a plan, may be asked to use professional judgment in assisting with benefits determinations. In using such judgment, the licensed professional might demonstrate incompetence or some other deficiency. If the appropriate licensing agency determines that

a professional with such a deficiency threatens the public health or safety or is otherwise unqualified to hold and use a license, it may revoke or otherwise limit use of that license.

By enforcing a subpoena to investigate the use of professional judgment in the course of benefits review, licensing agencies act for the public, not for individuals, even for complainants. Licensure investigations do not currently nor retroactively affect "utilization review" or the benefits an ERISA plan provides to any participant or beneficiary. Licensing agencies have only limited authority. They cannot grant relief to any plan participant; they can only protect the public by revoking or limiting use of the licenses they grant and supervise.

The Board here is subject to those same limitations. It could not obtain any relief for V.G. It could only do what its authorizing statute, Mo. Rev. Stat. § 334.100 (2000) (*see* Petition at 3), permits: impose censure, reprimand, suspension, or revocation of a physician's license. The Board cannot take action against the plan, nor against Prudential as the plan administrator, regardless of the existence of ERISA, the Board's subpoena authority, or the Missouri Supreme Court's decision.

In asserting that the decision below creates a conflict among the courts, Dr. Fallon fails to recognize the limitations on the Board's role. Instead, he stretches the Board's authority and actions and the Missouri Supreme Court's decision beyond their logical and legal bounds, trying to bring them into conflict with decisions of this and other courts. The fact remains that the decision below merely upholds the Board's authority to investigate whether Dr. Fallon remains qualified for the license it granted him.

2. Dr. Fallon also stretches the precedents of this Court, trying to bring them into conflict with the decision below. He

begins within bounds; he observes, correctly, that "this Court's cases make clear that state laws unquestionably are preempted to the extent they purport to authorize 'alternative enforcement mechanisms' ... to remedial provisions set forth in § 502 of ERISA, 29 U.S.C. § 1132."[3] Petition at 8, quoting *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995) ("*Travelers*"). But his errors begin to mount immediately. In defining an "alternative enforcement mechanism," he abandons the facts of the cases on which he relies. In each case he cites, the plaintiff claimed to have been injured by a decision of an ERISA plan, and sought a personal remedy outside the scope of those that ERISA allows. Dr. Fallon does not cite a single case in which this Court addressed the state regulation of licensed professionals.

He begins with *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987). Plaintiff Dedeaux was an ERISA plan participant who suffered a back injury from an employment-related accident. *Id.* at 43. He sued his plan's insurer, Pilot Life, after it terminated disability benefits. *Id.* But Dedeaux did not assert any of the several causes of action available to him under ERISA. *Id.* at 44. Rather, he sued under Mississippi contract and tort law. *Id.* at 43.

Dr. Fallon turns next to *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Taylor, like Dedeaux, was an

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[3] Section 502(a), states in pertinent part: "A civil action may be brought...(1) by a participant or beneficiary .. (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]" Of course, no "participant or beneficiary" seeks to "recover benefits," "enforce" or "clarify ... rights," or otherwise participate in this case.

ERISA plan participant. *Id.* at 60. He, too, had back injuries that caused a disability. *Id.* at 60-61. And he too, after having been denied benefits by his plan's insurer, sued under state contract and tort theories rather than avail himself of the remedies provided by § 502 of ERISA. *Id.* at 61.

In passing, Dr. Fallon cites *Ingersoll-Rand v. McLendon*, 498 U.S. 133 (1990). There, too, the plaintiff-employee sought "compensatory and punitive damages under various tort and contract theories; he did not assert any cause of action under ERISA." *Id.* at 135.

This Court's holdings that states could not create "alternative enforcement mechanisms" cannot be divorced from the context of the claims in *Pilot Life*, *Taylor*, and *Ingersoll-Rand*, each of them an attempt by a plan participant to obtain personal remedies in the form of tort damages and breach of contract awards. The question was never merely whether a claim was "based on an alleged improper processing of a claim for benefits." *Pilot Life*, 481 U.S. at 48, quoted, Petition at 9-10. In each case it was more specific, *i.e.*, whether "the civil enforcement provisions of ERISA § 502(a) [are] the exclusive vehicle for actions *by ERISA-plan participants and beneficiaries* asserting improper processing of a claim for benefits, and [whether] varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." 481 U.S. at 50-51 (emphasis added). In *Pilot Life*, *Taylor*, and *Ingersoll-Rand*, this Court ensured that benefits for plan beneficiaries are "subject to a uniform body of benefits law." *Travelers*, 514 U.S. at 655.

In none of those cases did the Court consider state licensing of professionals. The Court never said – and could not logically say – that state laws addressing the competence of medical professionals were part of the "body of benefits law"

covered by ERISA. The Court did not say that the *state*, as opposed to *participant or beneficiary*, could never review an exercise of professional judgment. The Court never suggested that state action to prospectively protect public health was an "alternative enforcement mechanism" precluded by ERISA.

3. Dr. Fallon takes the same tack – stretching precedents beyond their reasonable bounds – when he asserts that the Missouri decision conflicts with the "decisions of several courts of appeals, which have uniformly concluded that state laws that establish 'alternative review mechanisms' for the denial of ERISA benefits are preempted under *Pilot Life*." Petition at 12. By subtly shifting to "alternative review mechanisms," he implies that the "several courts of appeals" have extended the scope of ERISA preemption further than this Court's bar on "alternative enforcement mechanisms." Dr. Fallon reinforces that impression by placing the new, broader phrase in quotation marks. But he provides no citation for his "quote." Indeed, the phrase seems to be his own invention; respondent's searches using electronic databases have failed to find it in any ERISA decision of any U.S. court of appeals.

Indeed, with regard to ERISA preemption in any respect pertinent to this case, the courts of appeals have gone no further than has this Court. Each court of appeals' opinion Dr. Fallon cites decides only what this Court decided in *Pilot Life*, *Taylor*, and *Ingersoll-Rand*: that plan participants and beneficiaries cannot use alternative state mechanisms to obtain remedies that ERISA does not provide.

Dr. Fallon highlights a case brought against him, *Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999). Dr. Fallon had determined that Hull, a plan participant, did not need a thallium stress test, notwithstanding a contrary determination by the participant's own physician. Dr. Fallon's medical judgment was wrong; Hull suffered a debilitating heart attack that could have been

prevented had he had the thallium stress test. Because the plan refused coverage based on Dr. Fallon's decision, Hull sued, asserting medical malpractice under state tort law. The court of appeals stated that "although Hull's characterization of his claim sounds of medical malpractice, the essence of his claim rests on the denial of benefits," and, therefore, his suit "falls squarely within the scope of Section 502(a) [and is] completely preempted by ERISA." *Id.* at 943. In so holding, the court was doing nothing more than this Court did in *Pilot Life*, *Taylor*, and *Ingersoll-Rand*.

The other Eighth Circuit cases cited by Dr. Fallon do the same. As Dr. Fallon admits, the claims brought in *Kuhl v. Lincoln National Health Plan*, 99 F.2d 298 (8th Cir. 1993), were "for tortious interference, medical malpractice, and breach of contract." Petition at 14. *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 440 (8th Cir. 1997), involved "a state law breach of fiduciary duty claim." Petition at 14. And *Thompson v. Gencar Health Systems, Inc.*, 202 F.3d 1072 (8th Cir. 2000), presented "a malpractice claim brought against a plan administrator." Petition at 15. In these and other cases, the Eighth Circuit may have held "that 'ERISA completely preempts a state law medical malpractice claim.'" Petition at 14, quoting *Thompson*, 202 F.3d at 1073. But it has not extended that holding beyond cases in which a plan beneficiary is attempting to obtain relief outside ERISA's limited remedies.

Dr. Fallon's travels through decisions by other circuit courts of appeals produce equally unhelpful case law. He cites three decisions: *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1 (1st Cir. 1999), *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992), and *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1472 (7th Cir. 1996). All three were actions brought by plan participants or beneficiaries seeking remedies and relief directly related to a denial of benefits. Neither the First, nor the Fifth, nor the Seventh Circuit broadly held, as Dr.

Fallon suggests, that a state can never review a decision that "may entail the exercise of medical judgment" merely because that decision is made in the course of "plan administration." Petition at 18. As in *Hull* and the other Eighth Circuit cases, in each, the other courts of appeals held only that a plan participant or beneficiary cannot rely on state law for remedies that extend beyond ERISA.

4. Every decision that Dr. Fallon suggests is in conflict with the decision of the Missouri Supreme Court, then, holds merely that a plan participant or beneficiary cannot use state law to obtain relief beyond that which ERISA permits. But here, there is no participant or beneficiary plaintiff. There is no request for relief that would flow to or in any way assist a participant or beneficiary. The Board is only trying to protect the public health by determining whether a professional it licensed used his professional judgment in a way that casts doubt on his qualifications to maintain that license. Dr. Fallon's effort falls not within the scope of the precedent he cites, but within a realm that this Court has recently reiterated is not preempted by ERISA.

Even in the ERISA context, there is a "presumption against pre-emption in areas of traditional state regulation." *Egelhoff v. Egelhoff*, 121 S.Ct. 1322, 1330 (2001). The states' "historic police powers" are superseded only if "that was the clear and manifest purpose of Congress." *Travelers*, 514 U.S. at 655. This Court's recent declaration in *Egelhoff* merely confirmed what it held in *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 813 (1997), *i.e.*, that when Congress enacted ERISA, it intended that state regulation continue. If Dr. Fallon were to concede that the licensing of professionals, who happen to be employed by an ERISA plan, fell within the presumption in favor of preserving traditional state regulation, his alleged conflict among the courts would evaporate. So without citing precedent nor explaining his logic,

Dr. Fallon asserts that the presumption in favor of continued state regulation "plainly has no application here." Petition at 10.

He does not and cannot argue that any court has held that licensing health professions is outside the scope of traditional state regulation. After all, states have been licensing doctors for nearly 200 years. *See, e.g., Towle v. Marrett*, 2 Maine 22 (1824); *Ex parte Thompson*, 10 N.C. 355 (1824). *See also State v. Hereford*, 13 Mo. 3 (1850). Dr. Fallon instead argues that the Board's investigatory subpoena is not within the traditional domain of state regulation because the act being reviewed, though requiring the exercise of medical judgment, occurred in the course of utilization review. In essence, he suggests that ERISA changed the scope of traditional state regulation — a proposition that finds no support in the cases Dr. Fallon cites nor in the argument he makes. Dr. Fallon then claims that the regulation of professions will become a "back door" through which someone will "attempt to circumvent ERISA's preemption of direct liability claims against plan administrators," Petition at 20-21 (citing professional literature warning doctors of the possibility of licensure review), and that "plan members and others" are filing complaints about physicians employed by ERISA plans at an "alarming rate," Petition at 21 (citing no authority at all). If the day comes when "plan members" obtain relief by going through that "back door," there may be a conflict or other concern that merits this Court's review. But we have not reached that day yet – at least not in Missouri, and not in this case. In fact, Prudential reversed Dr. Fallon's decision regarding V.G. long before the Board began to took at it. *See* Pet. App. at 11a.

5. Finally, Dr. Fallon returns to his efforts to transform this case, a narrow dispute over an investigation into medical judgment, into the proverbial hole that will, if left untended, bring down the managed care dike. But if there is a hole, it is

not untended; the lower courts are already drawing the right line when considering efforts of licensing boards to reach the edges of their authority. That is demonstrated in the only two cases Dr. Fallon cites in which the court actually addressed the ability of licensing boards to study physicians' determinations of medical necessity, *United Healthcare Ins. Co. v. Levy*, 114 F.Supp. 2d 559, 565 (N.D. Tex. 2000), and *Murphy v. Board of Medical Examiners*, 949 P.2d 530, 533 (Az. App. 1997).

Dr. Fallon is right when he asserts that the court in *Levy* held "that ERISA preempts a state medical board's authority to discipline a physician for making improper utilization determinations." Petition at 20. But the Texas board was attempting to review non-medical utilization determinations; the court expressly found that the physician did not "make any finding of medical necessity." 114 F.Supp. 2d at 561 n. 1. Thus it left "the question whether a physician acting as a utilization review agent who exercises medical judgment to determine what is medically necessary for a patient's case ... is subject to the Board's regulatory authority ... for determination on another day in another case." *Id.*

By contrast, the court in *Murphy* was addressing the exercise of medical judgment. The court explained that Dr. Murphy was not just performing utilization review, he was making a "medical decision":

> Dr. Murphy evaluated information provided by both the patient's primary physician and her surgeon. He disagreed with their conclusion . . . . Dr. Murphy substituted his medical judgment for theirs and determined that the surgery was "not medically necessary." There is no other way to characterize Dr. Murphy's decision: it was a "medical decision."

949 P.2d at 536. Dr. Fallon concedes that he made that same kind of decision. Petition at 3.

For licensing agencies to review such medical decisions does not pose a real threat to ERISA's goal of providing employees like V.G. with healthcare benefits. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). If challenges to such reviews are "recurring" (Petition at 19-20), it will be the result of physicians trying to erase the line defined by cases such as *Levy*, *Murphy* and this one – physicians who want their medical decisions to be immune from professional review, entitling them to retain their licenses even if there are manifest deficiencies in their medical judgment. The possibility that some physicians will follow that course does not merit this Court's review.

CONCLUSION

For the reasons stated above, the Court should deny the writ.

Respectfully submitted,

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